cases of committal for contempt of court."

So much about the principle of law that should generally apply in all cases of this nature.

Before departing I would like to say a few words on the procedure that should be followed by the subordinate court when faced with a situation similar to that described by the trial magistrate in this case. Section 353 of the Criminal Procedure Code and paragraph 24 of the Third Schedule to the Courts Ordinance while empowering the court to exercise summary power of punishment for contempt do not in so many words prescribe the procedure to be followed. Be that as it may I would advise magistrates to follow the procedure which is described in section 12(1) of the Oaths and Affirmations Ordinance No. 51 of 1949 which, in my opinion, clearly embodies the principle of law that should generally apply in cases of contempt. When contempt is committed in the view or presence of the court the first thing to do is to order the offender to be detained by the police and at the same time to record the act or statement constituting the contempt. The court can then proceed with its other business for the day. After completing other business but before rising the offender shall be produced again to be dealt with. If the magistrate decides to take cognisance of the contempt the act or statement constituting the contempt already recorded shall be read out to the offender who is then asked to show cause why he should not be punished. If, as in this case, one or more persons who were committed for contempt could satisfy the court that they were not in any way involved in or responsible for the shouting and singing which had interrupted court proceedings, they obviously could not be punished for contempt. On the other hand, if the magistrate decides not to take cognisance of the offence he may either order the offender to be released or authorise the prosecution under paragraph 24 of the Third Schedule to the Courts Ordinance.

In the case under review I am compelled to say that justice requires that I should exercise my revisionary power and set aside the committal order made against the 68 persons.

Committal order set aside.

PEARLSON ENTERPRISES LTD. v. HONG LEONG CO. LTD.

[F.C. (Wee Chong Jin C.J., Tan Ah Tah F.J. & Buttrose J.) August 7, 1967]

[Singapore—Federal Court Civil Appeal No. Y. 38 of 1966]

Contract — Supply of bricks — Sole selling agents, by — Price agreed — Manufacturers' increase — Whether supplier entitled to pass on increased price — Purchaser refusing to accept increased price — Whether breach of contract.

The respondents who were the sole selling agents of a company manufacturing bricks sold to the appellants who were a building and developing company 600,000 pieces of bricks under a written contract dated June 18, 1964. The deliveries were to be made in instalments over a period of six months and payments for the instalment deliveries were to be made by certain stipulated due dates. The said written contract was subject to the general conditions printed on the back thereof except where inconsistent with special conditions specified.

These printed conditions whether they established that sellers (respondents) were merely agents of the manufacturers and not themselves liable or whether they had the effect of making them contract as principals, was the source of dispute. Also whether any increase in the price of bricks by the manufacturers at any time could be passed on to the buyers so as to be the determining price under the relevant clause of the written contract. Correspondence between the solicitors did little to clarify the dispute which came to a head; the respondents ceasing further supplies resorted to the court for claiming the price of bricks delivered while the appellants counterclaimed for damages for failure to deliver thereby compelling them to seek other sources of supply to carry on their building projects.

The sole issue at the trial of the action and counterclaim was whether it was the appellants or the respondents who were in breach of contract.

The trial judge gave judgment for the respondents on the claim and dismissed the counterclaim. On appeal by the defendants/appellants:—

Held: the contract was one between a vendor and a purchaser and not one between an agent on behalf of a principal and purchaser, it therefore, followed that the manufacturers' increase in price could not alter the price stipulated in the contract and be passed on to alter the contract price.

Appeal allowed. On counterclaim order made for retrial.

Case referred to:—

(1) *W. T. Lamb & Sons* v. *Goring Brick Co.* [1932] 1 K.B. 710.

FEDERAL COURT.

K. A. O'Connor for the appellants.

K. S. Chung for the respondents.

Cur. Adv. Vult.

Wee Chong Jin C.J.: This is an appeal by appellants, Pearlson Enterprises Limited against a judgment of Winslow J. in the High Court in favour of the respondents, Hong Leong Company Limited for $11,575.45 and costs and dismissing the counterclaim of the appellants with costs. The facts which I shall attempt to set out as briefly as possible are these.

The respondents who are the sole selling agents of a company manufacturing *inter alia* bricks sold to the appellants who are a developing company building flats for sale or rental 600,000 pieces of bricks under a written contract in the following terms:—

"Singapore, 18th June, 1964.

Messrs. Pearlson Enterprises Ltd., of 18-L, Battery Road, Singapore (hereinafter called 'the buyers') hereby confirm having purchased this day from M/s. Hong Leong Co. Ltd. of Singapore, (hereinafter called 'the

sellers') the undermentioned goods at the prices and on the terms and conditions hereinafter appearing and subject to the general conditions printed on the back hereof, except where inconsistent with the following special conditions.

Quantity	Description of Goods	Price
	Alexandra Bricks	
600,000 pieces	No. 3 Commercial Quality	@ $79.00 per 1,000 pcs.

Delivery as from June to December 1964.

Delivery

PAYMENT As Usual."

The material provisions of the printed general conditions are as follows:—

"Deliveries

2. Dates given for delivery are approximate only. The delivery of one instalment delivered under this contract shall be considered as a separate contract. Default in delivery of any instalment shall not enable the buyers to treat the contract as repudiated. . . .

All payments for goods to be delivered in instalments to be made on due date otherwise the sellers may at their discretion refuse to deliver further instalments until such payments be made. . . .

Increase in prices

4. (a) Should the cost of goods be increased by any circumstances of any kind whatsoever beyond the control of the sellers including (but not by way of limitation) variations in rates of exchange, devaluation of any relevant currency or increase in relevant rates of freight or insurance, such increase shall be borne by the buyers.

Sellers Agents and not themselves liable. (Delete if Sellers contract as Principals)

8. (a) This contract is subject to confirmation and acceptance by manufacturers or suppliers and is also subject to any conditions contained in the manufacturers contract with the sellers if they vary or are inconsistent with the general conditions herein contained and particularly the right of cancellation and restriction of liability contained in any manufacturers contract.

(b) The sellers contract as agents and are not to be bound under these conditions but notwithstanding this condtiion or the other conditions here appearing the sellers reserve to themselves the right to institute any action against the buyers under the contract of which these conditions form a part as though the sellers were principals should the sellers deem it necessary or expedient so to do.

(c) The buyers shall be entitled to the benefits of but subject to the conditions of sale of the actual manufacturer or supplier of the goods including all manufacturers & guarantees so far as the latter conditions are not inconsistent with the above conditions."

The material terms of the agreement between the respondents and the manufacturers under which the former became the selling agents of the latter provided as follows:—

"(1) You will be selling agents for Alexandra Brickworks Ltd. from 1st February 1964.

(2) All bricks and tiles sold as from this date will be billed to you on our ex. factory price less 6% commission to you.

(3) The price of the bricks are as follows:—

No. 3 quality . . . . $75 per thousand.

(4) Transport charges will be added and are as follows:—

$6 per thousand within 5 miles limit and $7 per thousand beyond 5 miles. As stated previously where large quantities are involved, reconsideration may be given to the amount of transport charged.

(6) Terms of payment . . . . 60 days. . . . We trust with the above arrangements you will now endeavour to push the sales to the best of your ability . . . ."

The appellants were not aware of the terms of the above-mentioned agreement until after the commencement of the action against them.

On 18th October 1964 the manufacturers wrote to the respondents that as they "have to pay increased labour" they "have no alternative but to increase your supplies" to the appellants by $3 per thousand bricks with immediate effect. The trial judge found that this increase of $3 per thousand bricks was communicated orally by the respondents to the appellants and that the appellants orally agreed to pay for future bricks delivered at the increased price. Subsequently a letter dated 7th November 1964 was sent by the respondents to the appellants in the following terms:—

"Dear Sirs,

Re: No. 3 quality Bricks for Cavanagh Road.

Due to our increase in transport charges by the Alexandra Bricks Works Ltd., as from 15th October 1964, we are not able to supply you bricks at the previous price of $79 per 1,000 pieces delivered.

Our sales representative, Mr. Low has been to see and informed you that the new price will be $82 per 1,000 pieces delivered to which you agreed.

Kindly let us have your confirmation in writing."

The appellants did not reply to this letter until the 2nd December 1964 when their solicitors wrote to the respondents in the following terms:—

"Dear Sirs,

We act for Messrs. Pearlson Enterprises Ltd., who have handed us your letter of the 26th ultimo for attention.

Our clients instruct us that they have not agreed to any variation in the contract price. We understand that your representative spoke to our clients' representative and was told that if you wanted anything you should write a letter of request.

Our clients have considered your request and have decided that they are not prepared to agree to an increase in the contract price. We are instructed to point out that the contract provides for delivery by December at the latest. So far less than 200,000 out of the 600,000 bricks have been delivered and our clients require you to start delivering the balance in large quantities immediately.

Our clients have already suffered loss and damage by your delay. This is increasing daily and our clients intend to hold you fully liable for all such loss and damage that has and may occur due to your default."

In the meanwhile the respondents had on the 27th November 1964 written another letter to the appellants pressing for payment of three outstanding accounts.

The trial judge found that the denial of the agreement to pay the increased price in the letter of the 2nd December was an afterthought on the part of the appellants occasioned by the respondents pressing for payment of overdue accounts and because it was around this period that the appellants were beginning to feel financial embarrassment.

The respondents continued to deliver bricks to the appellants, the last delivery being of 1,700 bricks on the 4th December 1964 and it is of some significance that delivery stopped two days after the appellants had through their solicitors refused to agree to the increase of the price by $3 per thousand. From the 4th December no more bricks were delivered by the respondents and they refused to deliver unless, according to their solicitors' letter of 5th December 1964, "all sums now due are paid within (1) week from the date of receipt of this letter. Any loss and damage alleged in your letter could only have been caused through your clients' delay or refusal in payment".

On 12th December 1964 the appellants' solicitors replied enclosing a cheque for $23,425.60 to cover all amounts owing up to the end of September and they continued to assert that "payment as usual" under the contract meant that they were allowed credit of 3-4 months. The letter proceeded to require delivery of 200,000 bricks within one week under the contract as the appellants were suffering substantial damage as a result of the respondents' failure to deliver bricks. At that date there was a total of 281,000 bricks outstanding under the contract.

To this letter the respondents on 15th December 1964 replied through their solicitors in the following terms:—

"Dear Sirs,

Pearlson Enterprises Limited and Hong Leong Co. Ltd.

We have received your letter of the 12th instant. The writer is dealing with this matter during the absence of Mr. Chung, and he spoke to Mr. Arkell on the telephone this morning. Subsequent to that conversation, we were instructed that our clients sell bricks as agents for Alexandra Brickworks, Limited, and the latter will confirm this. The selling price of bricks is controlled by the manufacturers and our clients' profit on the sale of bricks arises by way of commission. Clause 8 of the contract therefore applies in this case.

That being so, whether or not there was an agreement to pay the increased price is quite beside the point, although our clients maintain their position on this question. We enclose copies of two letters from Alexandra Brickworks Limited which clearly indicate the position.

According to our clients 'Payment as usual' means 2 months and not 3-4 months; even so, your clients have failed to make payment within 3-4 months; the first delivery in July, on the 3rd, was for 4,000 bricks. If your clients thought they had 4 months credit, payment should still have been made by the 3rd November. Clause 3 of the contract appears to be on point.

Regarding the present position, our clients can supply bricks in large quantities at reasonably short notice, but only on the following terms:—

(1) that payment is made now for all bricks and other materials delivered up to 31st October 1964 amounting to $6,907.60;

(2) that payment for all bricks and other materials delivered between 1st November up to date is made promptly within 2 months; this amounts to $3,516;

(3) that payment for all bricks at $85 per 1,000 to be delivered in the future is made on delivery.

Your clients' cheque for $23,425.60 is accepted without prejudice to what is said above and to the fact that the correct amount due is $23,521.40, a difference of $95.80.

Kindly let us know what your clients' decision is so that we may advise our clients."

Assuming that the provision in the contract "payment as usual" meant that the appellants were entitled to credit for 60 days and not 3-4 months, the appellants, notwithstanding the cheque sent on the 12th December 1964, would have failed to pay in accordance with the terms of the contract for the bricks delivered between 1st October to 12 October 1964 inclusive. On the other hand no evidence was led by the respondents as to the quantity of bricks delivered during this short period and the respondents were clearly not entitled to demand by their letter of the 15th December as a condition for resuming delivery that the appellants should make immediate payment for bricks that had been delivered up to 31st October 1964 or for bricks to be delivered in the future. Nor, unless on the true construction of clause 4(a) of the contract it entitled them to pass on to the appellants any price increase made by the manufacturers to them, were the respondents entitled as a condition for resuming delivery of bricks that the appellants should agree to pay for bricks to be delivered under the contract at the increased price of $85 per thousand.

Not unnaturally, therefore, the appellants on the 19th December 1964 replied through their solicitors that they considered the letter of the 15th December amounted to a complete repudiation of the contract and that they would obtain the outstanding bricks elsewhere at the best price obtainable and would hold the respondents liable for any damages they suffered as a result of the respondents' breach of contract.

To this letter the appellants' solicitors received a reply dated 2nd January 1965 which is significant in that the previous condition requiring immediate payment on delivery was not reiterated but it merely reiterated that they

insisted on the new price i.e. $85 per 1,000 bricks as being the contract price by virtue of clause 4 of the contract and offered to treat the contract as at an end if the new price was not acceptable to the respondents.

On the 5th January 1965 the solicitors for the appellants replied to the effect that as it was the respondents who had repudiated the contract by their failure to make delivery, their offer to treat the contract as at an end if the new price was not acceptable could not be understood and again informed the respondents that the appellants were seeking to mitigate the damages by trying to obtain bricks of similar quality as soon as possible and at as reasonable a price as possible.

The letter of 5th January 1965 evoked the reply on 8th January 1965 that "our clients (the respondents) refused to make delivery last year by reason of your clients' failure to make payment in accordance with the terms of the contract", and an offer to supply the remainder of the bricks under the contract at the contract price of $79 per 1,000 but reserving the right to sue the appellants for the difference of $6.

Had the appellants accepted the offer contained in the letter of the 8th January 1965 the dispute over the true contract price might have been amicably resolved but they took the view in their reply dated 12th January 1965 that as they were arranging to obtain bricks elsewhere it was too late for the respondents to offer to make delivery on the terms contained in the letter of the 8th January 1965.

The appellants followed with another letter two days later dated 14th January 1965 stating categorically that they had ordered 300,000 bricks from elsewhere at a price higher than the price under the contract.

In fact, there was a shortage of supplies of similar quality bricks throughout Singapore and it was not until 18th January 1965 that the appellants were offered a supply of only 200,000 bricks, delivery within three months, at the rate of 2,000 pieces or more each day, of which 100,000 were of similar quality at the rate of $85 per 1,000 and the other 100,000 of second quality at the rate of $95 per 1,000. They accepted this offer and were granted two months' credit terms.

On 1st March 1965 the respondents commenced these proceedings by way of a specially indorsed writ claiming the sum of $10,519.40 as the balance due for bricks and other building materials sold and delivered and the sum of $1,315.08 being loss of profit resulting from the refusal of the appellants to take delivery of 281,000 bricks in accordance with the contract of sale of the 18th June 1964.

On 17th March 1965 and the 27th March 1965 the respondents pursuant to requests for particulars, filed further and better particulars stating that the appellants refusal to take delivery of the 281,000 bricks was by their solicitor's letter of 12th January 1965 and alleging that the respondents were entitled under clause 4 of the contract to and did increase the price to $82 per 1,000 bricks from 16th October 1964 and to $85 per 1,000 bricks from 15th December 1964.

The appellants in their defence admitted owing the sum of $10,260.35 in respect of the respondents claim for $10,519.40 but denied liability in respect of the claim for loss of profit. They denied that they refused to take delivery and alleged that they were at all material times ready and willing to take delivery but the respondents refused to deliver unless and until they agreed to pay more than the price of $79 per 1,000 bricks. In their further and better particulars they alleged that the respondents' refusal to deliver the bricks was "verbal and in writing on or about 7th November 1964 recorded in letter of that date. . . .". They also claimed they were entitled to set-off against the amount due, the loss and damage they suffered by the refusal of the respondents to deliver bricks "unless and until the defendants (appellants) agreed to pay more than the said price of $79 per 1,000 pieces" and counterclaimed for damages for failure to deliver which they particularised at $41,681.79.

Before the trial of the action the respondents, having applied for leave to sign final judgment, on 5th October 1965 obtained a consent order that they be at liberty to sign judgment against the appellants for $10,260.35, being the sum admitted by the appellants to be due, subject to a stay of execution until the disposal of the appellants' counterclaim. The respondents took no action on the order granting leave to sign judgment.

Subsequently the respondents in their solicitor's letter of 6th October 1965 agreed that the difference between their claim of $10,519.40 and the sum of $10,260.35, which the appellants admitted was due and owing, was not properly claimable.

The sole issue therefore at the trial of the action and counterclaim was whether it was the appellants or the respondents who were in breach of contract.

So far as the respondents' claim is concerned from the pleadings, the respondents' case, apart from the claim in respect of goods previously delivered, was that they had suffered loss of profit amounting to $1,315.08 by reason of the appellants' refusal to take delivery of 281,000 bricks and that this refusal was on the 12th January 1965 by a letter from the appellants' solicitors. The defence to this claim for loss of profits was a denial that the appellants had re-

fused to take delivery and an averment that the appellants were at all material times ready and willing to take delivery but the respondents refused to deliver unless and until the appellants agreed to pay more than the contract price of $79 per 1,000 bricks.

So far as the counterclaim is concerned, the appellants' case was they had suffered loss and damage as a result of the respondents' failure to deliver the balance of 281,000 bricks because the respondents were not entitled to require them to pay more than the contract price of $79 per 1,000 bricks.

In my opinion it is clear on the pleadings that it was no part of the respondents' case that this refusal to deliver was because the appellants had failed to make payment in due time in respect of bricks previously delivered and that this failure in all the circumstances entitled the respondents to treat the appellants as having repudiated the contract and to sue for damages. Their case on the pleadings was that the appellants were in breach of contract by reason of their having on the 12th January 1965 told the respondents that they would not accept any more bricks.

The burden therefore was on the respondents to prove that the contract was at that date still binding on both parties. The correspondence between the parties conducted through their respective solicitors however shows that, at the latest by the 19th December, the appellants had elected to treat the respondents as having repudiated the contract by reason of their insistence on the 15th December on immediate payment on delivery for all bricks to be delivered in the future. In my judgment this was a breach on the part of the respondents which in all the circumstances entitled the appellants to treat as a complete repudiation of the whole contract so as to discharge the appellants from their obligations under the contract. On this view it mattered not whether condition 4 of the general conditions entitled the respondents to pass on the increase in the price of the goods to the appellants.

The trial judge failed to consider this fundamental matter and only dealt with the construction of condition 4. He held that this condition entitled the respondents to pass on the increase in the price to the appellants as the respondents, being agents had no alternative except to abide by the price increase which was imposed on them by their principals, and were therefore not attempting to do any act within their control.

With respect I disagree. The contract was one between a vendor and a purchaser and not one between an agent on behalf of a principal and a purchaser. Furthermore the defence being that the respondents were merely agents and therefore not entitled to sue upon the contract, they pleaded in their reply and defence to the counterclaim that they were entitled under the contract to sue as principals if they deemed it necessary or expedient to do so. The respondents having so elected under the contract to sue as principals, they were not entitled to rely on clause 4 of the general conditions.

In any event the contract between the respondents and the manufacturers, Messrs. Alexandra Brickworks Ltd. was not one of principal and agent but one of vendor and purchaser (see *W. T. Lamb & Sons* v. *Goring Brick Co.*,[1] and in my judgment the respondents were never entitled under the contract to pass on any increase by their manufacturers in the price on to the appellants. They were not agents of the manufacturers in the sense in which the term agent is understood in the law of principal and agent. Their so-called selling agency being in truth not an agency contract but a contract of vendor and purchaser it is clear on the terms of their contract with the manufacturers that the respondents were bound to pay no more than the price stated in clause 3 of that contract. The price they had to pay for bricks was absolutely within the control of the respondents and clearly condition 4, on the facts of this case, could not apply. If the respondents chose to accommodate, as a matter of commercial prudence, their suppliers, they were not in law entitled to call upon the appellants to bear the loss, if any, they would suffer as a consequence.

As regards the counterclaim the trial judge did not deal with it, except to dismiss it as a necessary consequence of his finding that the respondents did not repudiate the contract. Counsel for the appellant has accordingly asked for a re-trial of the counterclaim and I have come to the conclusion that this is the proper order to make.

For all these reasons I would allow the appeal and set aside the whole of the judgment of the trial judge and substitute therefor an order that the respondents' action for loss of profits be dismissed with costs here and in the court below. On the counterclaim I would make an order that there be a re-trial and that the costs of the counterclaim in the court below should abide by the result of the re-trial.

Tan Ah Tah F.J. and **Buttrose J.** concurred.

Appeal allowed. Counterclaim ordered to be re-tried.

Solicitors: *Drew & Napier; Chung & Co.*